FILE COPY

FILED
AUG 11 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 250

ARTHUR BINGAMAN, ADMINISTRATOR OF THE ESTATE OF ALVIN A. BINGAMAN, Deceased,

Appellant,

vs.

ERIC H. REHN,
JOHN P. MAINELLI, d/b/a JOHN P. MAINELLI CONSTRUCTION CO.,

Appellees.

BRIEF IN OPPOSITION TO APPELLEE REHN'S MOTION TO DISMISS

C. DELL FLOYD,
Washington, D. C.,
Counsel for Appellant.

COCKLE PRINTING CO., LAW BRIEFS, OMAHA

BLEED THROUGH-POOR COPY

INDEX

Pages

Statement 1

Analysis of Appellee Rehn's Objections to Jurisdiction and Motion to Dismiss 2

Argument:

I. Federal Questions Involved Are Substantial.. 2

II. Timeliness of Drawing in Question the Validity of a State Statute 5

III. Was the Validity of Nebraska State Statutes Drawn in Question? 7

CASES CITED

Burton vs. Carey, 82 Fed. (2) 657 ..... 3, 4

Chapman vs. Lamar-Rankin Drug Co., 13 S. E. (2d) 734 3

Cramer vs. Phoenix Mutual Life Ins. Co., 91 Fed. (2d) 141 4

In re Grainger's Estate, 121 Neb. 338, 237 N. W. 153, 78 A. L. R. 597 6

Hague vs. C. I. O., 307 U. S. 960 9

Jackson vs. Denver Producing & Refining Co., 96 Fed. (2d) 457 4

Lincoln Printing Co. vs. Middlewest Utilities Co., 74 Fed. (2d) 779 4

Mattson vs. Central Elec. & Gas Co., 174 Fed. (2d) 218 8

AUTHORITIES CITED

4 C. J. S. No. 1354, pp. 1947-1948 3

Vol. 10, Cyc. of Fed. Proc. page 381 5

Section 1, Amendment XIV 5, 6, 7, 8

Section 48-118, Revised Statutes of Nebraska, 1943.... 8

Section 49-101, Revised Statutes of Nebraska, 1943.... 8

BLEED THROUGH-POOR COPY

Supreme Court of the United States

—o—

OCTOBER TERM, 1948

—o—

NO. _____

—o—

ARTHUR BINGAMAN, ADMINISTRATOR OF THE ESTATE OF ALVIN A. BINGAMAN, Deceased,

Appellant,

vs.

ERIC H. REHN,
JOHN P. MAINELLI, d/b/a JOHN P. MAINELLI CONSTRUCTION CO.,

Appellees.

—o—

BRIEF IN OPPOSITION TO APPELLEE REHN'S MOTION TO DISMISS

—o—

STATEMENT

This brief is filed under the provisions of Rule 7, para. 3, Rules of the Supreme Court, giving to an appellant the privilege of replying to appellee's motion to dismiss appeal.

(Identification, by page number, of references to the record, do not appear in this brief, for the reason that, at the time the brief was printed, the transcript of the record was incomplete and not available to appellant.)

ANALYSIS OF APPELLEE REHN'S OBJECTIONS TO JURISDICTION AND MOTION TO DISMISS

Appellee Rehn's objections and motion to dismiss apparently have as their foundation the following alleged defects:

(1)—Lack of a substantial federal question. "All questions raised and presented by Appellant * * * have become moot." Page 2, Appellee's objections and motion—Record, page .....

(2)—Federal question was not timely presented. "The matter of the jurisdiction of the Trial Court was not raised until after trial." Page 2, Appellee's objections and motion—Record, page .....

(3)—Validity of Nebraska State statutes was not drawn in question as being in conflict with the Fourteenth Amendment. (Appellee's objections and motion read: "It is most difficult to see how the provisions of this Amendment can be drawn into consideration on any matter involved in the present action.") Record, page.....

ARGUMENT

I.

Federal Questions Involved Are Substantial.

As a basis for his motion for dismissal, Appellee Rehn classifies as "moot" the questions involved in this appeal. But examination will show that they cannot be so considered. The rule is that, whenever it affirmatively appears that if the matters complained of were reversed, *the appellant would receive some benefit therefrom,* the appeal will not be dismissed on the ground that the questions raised by the appeal are *"moot";* and that, if the

BLEED THROUGH—POOR COPY

judgment, if unreversed, will preclude the party against whom it stands as to a fact vital to his rights the appeal will not be dismissed as *"moot." Chapman vs. Lamar-Rankin Drug Co.*, 13 S. E. (2d) 734; 4 C. J. S. No. 1354, pp. 1947-1948, and cases there cited, including *Burton vs. Carey*, 82 Fed. (2) 657.

In the opinion of the appellant, Appellee Rehn's Objections and Motion disclose a misconception of the character of a "Moot or Abstract" question as it relates to appellate proceedings. If the action of this court, in either affirming or reversing the decision of the Supreme Court of Nebraska on the matters involved in this appeal, could have no practical legal effect upon a then existing controversy, then the matters involved in this appeal would be "moot" or "abstract," and this court would be justified in dismissing this appeal. But this appeal involves a presently existing controversy between appellant and appellees (did a cause of action in favor of Rehn survive the death of the alleged wrongdoer), and a decision of this Court holding that a cause of action did *NOT* survive in favor of Appellee Rehn would have a practical legal effect upon a then existing controversy —in fact, it would have a final, decisive effect, i. e., *the termination of the litigation.* And any suggestion that the appellant would receive no benefit from such termination of the litigation is absurd. The benefit which Appellant Bingaman, administrator, will receive will be the favorable termination of the litigation, now represented by this claim now pending in probate court and three other actions involving the same legal questions.

A decision by this Court that the action of Nebraska courts, in permitting the institution and maintenance by

Eric H. Rehn of a suit against Administrator Bingaman, denied the administrator the protection of Section 1, Amendment XIV, Constitution of the United States, is a decision and judgment that Rehn cannot institute and maintain an action against the administrator. Surely, an appeal which may result in such a decision and judgment cannot be classified as insubstantial, moot, abstract or academic.

It is true that, if after an appeal has been taken, the controversy between appellant and appellee has become moot (or, in other words, if, due to changed conditions, the decision of the appellate court would have no practical legal effect) the appellate court will dismiss the appeal. It is also true that a case will not be dismissed where only a part of the controversy has become moot and other questions remain for decision. *Jackson vs. Denver Producing & Refining Co.*, 96 Fed. (2d) 457; *Lincoln Printing Co. vs. Middlewest Utilities Co.*, 74 Fed. (2d) 779; *Burton vs. Carey*, 82 Fed. (2d) 657; *Cramer vs. Phoenix Mutual Life Ins. Co.*, 91 Fed. (2d) 141. No part of the controversy between appellant and appellee involved in this appeal has, since the appeal was taken, become moot. But appellee's assertion that there is no controversy involved in the appeal may arise from his belief that, since he acquiesces in that part of the Nebraska Supreme Court's decision which was contrary to his views, and accepts it as final and conclusive, there must necessarily be no controversy between him and appellant over that part of the Nebraska Supreme Court decision which is in accord with his (Appellee Rehn's) views.

BLEED THROUGH—POOR COPY

Appellant Bingaman's and Appellee Rehn's acquiescence and agreement as to the effect of that part of the decision of the Nebraska Supreme Court in accord with appellant's views—does not render moot or prevent appeal on those parts of the decision of the Nebraska Supreme Court with which Administrator Bingaman does not agree. The controversy on those parts still remains.

If this appeal be dismissed and the decision of the Supreme Court of Nebraska stand unreversed, Rehn will contend in the prosecution of his claim, now pending in the probate court of Douglas County, Nebraska, that Administrator Bingaman was not denied the protection of Section 1, Amendment XIV, and that the law announced by the Supreme Court of Nebraska is conclusive. (Three other claimants, seeking $120,000, will follow the same procedure in prosecuting their claims.)

If this Court decides that Administrator Bingaman cannot be deprived of the equal protection of the laws by any action of the courts of the State of Nebraska, even if the deprivation is the result of an attempt by the state courts to bestow on other litigants (the four claimants injured in the accident of November 7, 1946) what the state court deems equal protection of the laws, the decision will terminate the litigation arising from the accident, the present action and three others above mentioned.

II.

Timeliness of Drawing in Question the Validity of a State Statute.

In Vol. 10, Cyc. of Fed Proc. page 381, the general rule governing the assertion of a federal question is stated:

"In a late case the Supreme Court states the general rule as follows: 'There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.' Where the state practice specifies the form or manner in which questions shall be presented below to make them reviewable in the state appellate tribunal, the federal question should be presented in the state trial court in the specified manner."—New York ex rel. Bryant vs. Zimmerman, 278 U. S. 63, 49 S. Ct. 61.

Has there been in the present case a compliance with Nebraska state practice? Appellant Bingaman asserts that there has been such compliance. And in support of that assertion he relies, in addition to the reasons heretofore given in his jurisdictional statement (p. ..... Rec.), on the practice disclosed in the case of *In re Grainger's Estate,* 121 Neb. 338, 237 N. W. 153, 78 A. L. R. 597, upon which the opinion of April 14, 1949, is founded. We quote from page 6 of Appellant Ward's *Reply Brief* in the Supreme Court of Nebraska (which is a part of the record in that case), and we challenge Appellees Rehn and Mainelli to assert in a reply brief (if they can so assert) that Appellant Ward had mentioned, in her original brief, the Fourteenth Amendment or "equal protection of the laws."

From page 6 of Appellant Ward's "Reply Brief" we quote as follows:

BLEED THROUGH—POOR COPY

"But by their argument upon the matter of wrongful death, however, counsel for appellee suggests a *NEW* proposition. If Miss Ward were to blame for the accident, certainly Mr. Grainger's administrator under our wrongful death act could maintain an action against her. Can it be said that the law denies her the reciprocal right when he was the wrongdoer simply because he is dead? The Fourteenth Amendment to the Constitution of the United States provides:

"No state shall * * * deny to any person within its jurisdiction, the equal protection of the law.

"If the law of Nebraska grants to a dead person's estate the right to recover from a living tortfeasor, is it not a denial of equal protection of the laws that a living person should be denied the right of recovery against the estate of a dead tortfeasor? Shall it be said that in Nebraska one can gain compensation for injuries affecting the pursuit of happiness only by dying?" (Emphasis in quoted matter supplied by Appellant.)

It appears from the foregoing that the Fourteenth Amendment was NOT brought into the Grainger case, in the trial court, nor in the appellate court until Appellant Ward filed her reply brief in the appellate court.

III.

Was the Validity of Nebraska State Statutes Drawn in Question?

Appellee Rehn's objections and motion to dismiss contain the following statement, which Appellant Bingaman interprets as an attempt to say that the validity of Nebraska statutes was not drawn in question:

"It is most difficult to see how the provisions of this amendment to the Constitution of the United

States can be drawn into consideration on any matter involved in the present action. Surely such procedure would have been most surprising to the people who drew and adopted said Article XIV." (p. —, Record.)

Continuing, Appellee Rehn says the question of repugnancy between the Fourteen Amendment and Section 13, Art. I, Constitution of Nebraska, could not be drawn in question, because the Nebraska constitutional provision is "but a restatement in broader and more general terms of the provisions of said Article XIV, Section 1, Constitution of the United States." Assuming that the Nebraska provision is but a restatement of the Fourteenth Amendment, appellee's inference that there can be no repugnance between the construction and application of a restatement of the Fourteenth Amendment and the original amendment—is wrong. The Supreme Court at times is called upon to deal with conflict between various courts of interpretations of the Fourteenth Amendment itself.

Section 48-118, Revised Statutes of Nebraska, 1943, contains no provision for the survival of the causes of action created by such section; indeed it recognizes they do not survive. Subrogation in the case of wrongful death is conditioned on the existence of "dependents."

Regarding Section 49-101, Revised Statutes of Nebraska, 1943, it seems to be Appellee Rehn's argument that the validity of such section can not be drawn in question, because the Supreme Court of Nebraska has interpreted such section and such interpretation is binding on the federal courts and the Supreme Court of the United States. The appellee fails to note that his quotation from *Mattson vs. Central Elec. & Gas Co.*, 174 Fed.

BLEED THROUGH—POOR COPY

(2d) 218, deals only with *"the state statute or the state constitution."*

Appellant Bingaman will briefly state the applicable rule:

> "Every question arising under the Constitution (the Constitution of the United States) may, if properly raised in a state court, come *ULTIMATELY* to this Court (the United States Supreme Court) for decision." (Emphasis supplied by appellant.)

Hague vs. C. I. O., 307 U. S. 960.

Respectfully submitted,

C. DELL FLOYD,

Washington, D. C.,

Counsel for Appellant.

BLEED THROUGH-POOR COPY

ALTERNATIVE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

OCTOBER TERM, 1948

NO. .....

ARTHUR BINGAMAN, ADMINISTRATOR OF THE ESTATE OF ALVIN A. BINGAMAN, Deceased,

Appellant,

vs.

ERIC H. REHN,
JOHN P. MAINELLI, d/b/a MAINELLI CONSTRUCTION CO.,

Appellees.

Appellant Arthur Bingaman, Administrator, respectfully requests that if, in the opinion of the Supreme Court, appealability of those parts of the judgment complained of is not shown by the appeal papers and appellant's brief in opposition to appellee's motion to dismiss, the papers whereon the appeal was taken shall be regarded and acted on as a petition for a writ of certiorari, and as if duly presented to the Supreme Court at the time the appeal was taken (as provided in Section 2103, Chapter 133, Title 28, United States Code). In the event they are so regarded, appellant suggests that opposing counsel be granted 15 days within which to file a brief in opposition.

INDEX

Page

Summary Statement of the Matter Involved 13

Jurisdictional Statement 13

The Questions Presented 15

Reasons Relied On for the Allowance of the Writ 16

Appendix—Nebraska Wrongful Death Act 20

CASES CITED

Samson vs. Neumann, 142 Neb. 556, 7 N. W. (2d) 60 15

Sheeley vs. Kraemer, 68 S. Ct. 836 18

AUTHORITIES CITED

Section 1257, Chapter 81, Part IV, Title 28, United States Code 13

Section 1, Amendment XIV, Constitution of the United States 16, 17

BLEED THROUGH—POOR COPY

SUPPLEMENTAL SHOWING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Appellant Bingaman here presents, in addition to the data contained in the papers whereon the appeal was taken, the following matters.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, by reference, incorporates under this heading matter appearing in his appeal papers explanatory of the matter involved.

JURISDICTIONAL STATEMENT

Section 1257, Chapter 81, Part IV, Title 28, United States Code, provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

This case is a case where the validity of a State statute is drawn in question on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, and where a title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes, or commission held or authority exercised under, the United States.

It is claimed, in this case, that the validity of a state statute is drawn in question as being repugnant to the Constitution of the United States, and also that title, right, privilege or immunity is specially set up or claimed under the Constitution. Reference is again made to the appeal papers for the State statutes whose validity is drawn in question, and reference is likewise made to the appeal papers to indicate the title, right, privilege or immunity specially set up or claimed under the Constitution.

The federal constitutional issues were, according to Nebraska practice, timely and properly presented. (*Note* —In the Grainger case, upon which the judgment complained of is based, the federal question involving the Fourteenth Amendment was presented for the *first* time in a reply brief in the Supreme Court.)

The validity of the Grainger decision, including, of course, the validity of the "equal protection of the laws," conclusion, was attacked by Appellant Bingaman in the Trial Court, and further objection made thereto in his original brief in the Supreme Court.

Reference is again made to appeal papers for additional proof a federal constitutional question was properly and timely presented.

———o———

BLEED THROUGH—POOR COPY

THE QUESTIONS PRESENTED

One of the questions here presented is whether or not there exists in Nebraska (since the decision in the case of *Samson vs. Neumann*, 142 Neb. 556, 7 N. W. (2d) 60) any basis for the inequality repugnant to the Fourteenth Amendment claimed to have existed in Nebraska at the time of the Grainger decision.

Another question presented is whether or not the decision of April 14, 1949, approving Appellee Rehn's claim, that he had a right to institute and maintain an action against the appellant-administrator, deprived such administrator of the rights guaranteed him by the Fourteenth Amendment. In other words, did the action of the Nebraska Supreme Court, in its attempt to confer upon Appellee Rehn rights enjoyed by other litigants, deprive Appellant Bingaman of rights enjoyed by other alleged wrongdoers?

Another question presented is whether or not Appellee Rehn could demand action by Nebraska Courts, and could Nebraska Courts confer upon Rehn rights—if such action must necessarily result in denial of equal protection of the laws to Appellant Bingaman.

Did the trial court commit reversible error in refusing to sustain defendant Bingaman's motion to vacate the judgment and dismiss the action, such motion being based on the claim that the cause of action did not survive the death of the alleged wrongdoer?

Did the Supreme Court of Nebraska commit reversible error in adhering to the theory stated in the Grainger case that a living injured person would be denied "equal

protection of the laws" in Nebraska, were he denied the right to institute and maintain an action against the personal representative of an alleged wrongdoer?

Did the Nebraska Supreme Court commit reversible error in refusing to grant Appellant Bingaman leave to file a second motion for rehearing, when the basis of such request was a plain and irreconcilable divergence between a rule announced in the opinion of April 14, 1949, and a rule announced in an opinion of the Supreme Court of Nebraska filed May 13, 1949, such divergence depriving Appellant Bingaman of the rights guaranteed him by Section 1, Amendment XIV, Constitution of the United States?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Herein the Supreme Court of the State of Nebraska has decided a federal question of substance not theretofore determined by this court.

1. The federal question of substance and not theretofore determined by this Court is whether or not that part of the English common law embraced in the maxim, "Actio personalis moritur cum persona," is repugnant to Section 1, Amendment XIV, Constitution of the United States.

2. The federal question of substance and not theretofore determined by this Court is whether or not a State court could, by holding that part of the English common law relating to the survival of causes of action

BLEED THROUGH—POOR COPY

for personal injuries was inapplicable and not suited to modern conditions, repeal or modify the English common law in force in a state, so that the common law of the state deprived a citizen of the United States of the protection of Section 1, Amendment XIV, Constitution of the United States.

3. And, also, the federal question of substance, and not theretofore determined by this Court is whether or not the judicial branch of a state government has the right to make a classification of tort-feasors which deprives certain tort-feasors of the protection of Section 1, Amendment XIV, Constitution of the United States.

4. And, also, the federal question of substance, and not theretofore determined by this Court, is whether or not the Nebraska Supreme Court could construe and apply certain provisions of the Constitution of the State of Nebraska, according to certain rules, in certain actions, and, in other actions, arbitrarily disregard such rules, if such a disregard deprived a citizen of the United States of the guarantees of the Fourteenth Amendment, Constitution of the United States.

II.

The decision of the Supreme Court of the State of Nebraska decides a federal question of substance in a way probably not in accord with applicable decisions of this Court.

In the opinion in the present case, Rehn vs. Bingaman, filed April 14, 1949, the Supreme Court of Nebraska announced its adherence to the rule of law set forth in In re Grainger's Estate, which is here quoted (emphasis supplied by Appellant):

> "We have held that a pending action for personal injuries does not abate by the death of the injured person, but may be revived by the decedent's personal representative. * * * The claimant argues that IT IS NOT AN EQUAL PROTECTION OF THE LAWS TO DENY TO HER THE RIGHT OF RECOVERY AGAINST THE DECEDENT'S ESTATE WHEN, UNDER OUR DECISIONS, AS NOTED ABOVE, THE RIGHT TO RECOVER FROM A LIVING TORT-FEASOR HAS BEEN GRANTED TO A DEAD PERSON'S ESTATE."

In adopting as its own, claimant's theory, as set out above, the Nebraska Supreme Court decided a federal question of substance in a way probably not in accord with an applicable decision of this Court, viz., the decision of *Sheeley vs. Kraemer,* 68 S. Ct. 836.

In the District Court trial court and in the Supreme Court Appellant Bingaman called attention to the fact that under Nebraska law (see Nebraska Wrongful Death Act in Appendix) no action by the personal representative of a person who had suffered wrongful death could be maintained against the personal representative of a person who had wrongfully caused the death of another, and Appellant Bingaman cited the inequality resulting from a decision permitting the institution and maintenance of the present action against him.

The question involved was, in the opinion of appellant, determined in the recent case of *Sheeley vs. Kraemer,* 334 U. S. 1, 68 S. Ct. 836, wherein it was said (emphasis supplied by Appellant):

> "Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied EQUAL PROTECTION OF THE LAWS

BLEED THROUGH—POOR COPY

if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. THE CONSTITUTION CONFERS UPON NO INDIVIDUAL THE RIGHT TO DEMAND ACTION BY THE STATE WHICH RESULTS IN THE DENIAL OF EQUAL PROTECTION OF THE LAWS TO OTHER INDIVIDUALS."

To paraphrase, the Constitution conferred upon Ward nor Rehn no right to demand action by the State which would result in the denial of equal protection of the laws to other individuals.

Respectfully submitted,

C. DELL FLOYD,

Washington, D. C.,

Counsel for Appellant.

APPENDIX

Sec. 30-809 (Revised Statutes) 1943,

NEBRASKA'S WRONGFUL DEATH ACT

Sec. 30-809. *Action for wrongful death; creation.* Whenever the death of a person shall be caused by the wrongful act, neglect or default of any person, company or corporation, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, *THE PERSON WHO,* or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

BLEED THROUGH—POOR COPY